(1)

91-311

No. 91-

In the Supreme Court of the United States

October Term, 1991

RAYMOND MIRELES,

Petitioner,

v.

HOWARD WACO,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

TONI RAE BRUNO
Attorney of Record for Petitioner
RAYMOND MIRELES

CHASE, ROTCHFORD, DRUKKER & BOGUST
700 SOUTH FLOWER STREET
FIFTH FLOOR
LOS ANGELES, CALIFORNIA 90017
TELEPHONE: (213) 626-8711

JOHN A. DALY
DAVID LINK
CHASE, ROTCHFORD, DRUKKER & BOGUST
Attorneys for Petitioner
RAYMOND MIRELES

Westside Law Publishers Los Angeles, California (213) 207-0272

QUESTIONS PRESENTED

1. Does a judge who directs police officers to bring an attorney of record in a case pending on the court's calendar before that court from another location in the courthouse exercise a judicial function within the court's jurisdiction which is absolutely immune from suit pursuant to 42 U.S.C. § 1983 under *Stump v. Sparkman*, 435 U.S. 349 [98 S.Ct. 1099, 55 L.Ed.2d 331] (1978)?

2. Do allegations that a judge acted unreasonably in conducting the court's proceedings in a pending case destroy the judge's absolute immunity under *Bradley v. Fisher*, 13 Wall. 335, 202 Ed. 646 (1872) as applied to § 1983 actions in *Stump v. Sparkman*?

LIST OF PARTIES

Petitioner: RAYMOND MIRELES—Defendant-Appellee *Waco v. Baltad*, 934 F.2d 214 (CA9 1991), United States Court of Appeals Ninth Circuit No. 90-55683; *Waco v. Baltad, et al.*, United States District Court Central District of California No. CV 89-6970-TSH. Petitioner is a judge of the Superior Court of the State of California for the County of Los Angeles.

Respondent: HOWARD WACO—Plaintiff-Appellant *Waco v. Baltad*, 934 F.2d (CA9 1991), United States Court of Appeals Ninth Circuit No. 90-55683; *Waco v. Baltad, et al.* United States District Court Central District of California No. CV-89-6970-TSH. Respondent is a Los Angeles County Deputy Public Defender.

While two additional defendants are parties to action No. 89-6970-TSH on file in the United States District Court for the Central District, they were not parties to the proceeding in the United States Court of Appeals for the Ninth Circuit of California, those defendants are Gregory Baltad and Nicholas Titiriga, officers of the Los Angeles Police Department.

No corporation is a party to the proceedings.

TABLE OF CONTENTS

TABLE OF AUTHORITIES CITED

Cases Page

Constitutional Provisions And Statutes

No. 91-

In the Supreme Court of the United States

October Term, 1991

RAYMOND MIRELES,

Petitioner,

v.

HOWARD WACO,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RAYMOND MIRELES hereby respectfully petitions the United States Supreme Court to issue a writ of certiorari to review the decision of the United States Court of Appeals for the Ninth Circuit filed in this action on May 24, 1991.

OPINIONS BELOW

The opinion of the Court of Appeals for the Ninth Circuit is reported in the official reports as *Waco v. Baltad*, 934 F.2d 214 (CA9 1991) and is contained in the Appendix hereto at pages A 1-5. The Federal District court issued no written opinion.

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered May 24, 1991. This petition is filed within ninety (90) days of that judgment. Jurisdiction is conferred upon this Court pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES

The following constitutional provisions and statutes are involved in this case:

Title 42, United States Code, section 1983:

> Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

California Constitution, Article VI, section 10:

> Superior courts have original jurisdiction in all causes except those given by statute to other trial courts.

California Code of Civil Procedure, section 187:

> When jurisdiction is, by the Constitution or this code, or by any other statute, conferred on a court or judicial officer, all the means necessary to carry it into effect are also given; and in the exercise of this jurisdiction, if the course of proceeding be not specifically pointed out by this code or the statute, any suitable process or mode of proceeding may be adopted which may appear most conformable to the spirit of this code.

California Code of Civil Procedure, section 128:

> (a) Every court shall have the power to do all of the following:
>
> (1) To preserve and enforce order in its immediate presence.
>
> (2) To enforce order in the proceedings before it, or before a person or persons empowered to conduct a judicial investigation under its authority.
>
> (3) To provide for the orderly conduct of proceedings before it, or its officers.
>
> (4) To compel obedience to its judgments, orders, and process, and to the orders of a judge out of court, in an action or proceeding pending therein.
>
> (5) To control in furtherance of justice, the conduct of its ministerial officers, and of all other persons in any manner connected with a judicial proceeding before it, in every matter pertaining thereto
>
> . . .

California Code of Civil Procedure, section 177:

> Every judicial officer shall have power:
>
> (1) To preserve and enforce order in his immediate presence, and in proceedings before him, when he is engaged in the performance of official duty;

(2) To compel obedience to his lawful orders as provided in this code . . .

STATEMENT OF THE CASE

On December 4, 1989, HOWARD WACO, a Los Angeles County Deputy Public Defender, filed a complaint in the United States District Court for the Central District of California naming as defendants, RAYMOND MIRELES, a Judge of the Superior Court of the State of California for the County of Los Angeles, individually, and two officers of the Los Angeles Police Department. (App. B 1-7.) The complaint alleged a single claim for relief under 42 U.S.C. § 1983 and averred jurisdiction pursuant to 28 U.S.C. § 1343(a)(4). (App. B-1)

The complaint further alleged that on November 6, 1989, the defendant officers were present in Judge MIRELES's courtroom as witnesses in a criminal matter set for hearing on the court's morning calendar in which WACO was counsel of record for Johnny Lee Smith. (App. B 3-4) Specifically as to Petitioner MIRELES, WACO asserted the judge "ordered [the officers] to forcibly and with excessive force seize and bring plaintiff to his courtroom." (App. B-3) WACO's complaint also alleged that at the time he was down the hall in another courtroom. (App. B-4) According to the complaint, the officers complied with the alleged order and Judge MIRELES ratified their acts. (App. B-4)

Judge MIRELES moved the Federal District Court to dismiss the action against him for failure to state a claim upon which relief could be granted pursuant to Federal Rules of Civil Procedure, rule 12(b)(1) and (6). The Federal District Court judge assigned to the matter, the Honorable Terry J. Hatter, granted that motion March 23, 1990. (App. C 1-3) Pursuant to a

motion by WACO, Judge Hatter ordered the dismissal be entered as a final judgment in favor of MIRELES on April 22, 1990 in accord with Federal Rules of Civil Procedure, rule 54(b). (App. D 1-3)

REASONS FOR GRANTING THE WRIT

I.

THE DECISION OF THE COURT OF APPEALS IS IN DIRECT CONFLICT WITH THIS COURT'S DECISIONS IN *BRADLEY V. FISHER*, *STUMP V. SPARKMAN* AND THE PRINCIPLE OF ABSOLUTE IMMUNITY FROM SUIT UNDER § 1983.

Despite more than a century of settled law, the Ninth Circuit has permitted a lawsuit against a judge who in a usual exercise of judicial authority ordered police officers to bring counsel of record before the court for a proceeding scheduled on its calendar. The opinion, declaring the novel proposition that a judge "can lose his immunity," strips the judge of his absolute immunity without engaging in the analysis prescribed by this Court as to whether the judge acted within his jurisdiction. By so holding, the opinion abrogates the controlling case law on absolute judicial immunity. Such an approach impermissibly renders absolute immunity conditional.

Since 1872, it has been the rule that judges are entitled to absolute immunity from civil lawsuits. *Bradley v. Fisher*, 13 Wall. 335, 351 [20 L.Ed. 646] (1872). That rule was expressly reaffirmed in the context of actions for damages under 42 U.S.C. § 1983 in *Stump v. Sparkman*, 435 U.S. 349 [98 S.Ct. 1099, 55 L.Ed.2d 331] (1978). This Court directed:

> "the necessary inquiry in determining whether a defendant judge is immune from suit is whether at the time he took the challenged action he had jurisdiction over the subject matter before him." *Id.* at 356.

The sole issue is the complete absence of jurisdiction. *Bradley* was explicit in declaring that acts "alleged to have been done maliciously or corruptly" are immune. *Bradley, supra*, 13 Wall. at 347. *Stump* adopted *Bradley's* mandate without qualification. *Stump, supra*, 435 U.S. at 356. Both *Bradley* and *Stump* hold the judge's state of mind is irrelevant to the requisite jurisdictional analysis:

> "A judge will not be deprived of immunity because the action he took was in error, was done maliciously, or was in excess of his authority; rather, he will be subject to liability only when he has acted in the 'clear absence of all jurisdiction.' " *Id.* at 356-57 (quoting *Bradley, supra*, 13 Wall. at 351); *Bradley, supra*, 13 Wall at 347.

The Ninth Circuit's decision in this case directly contradicts the rule of *Bradley* and *Stump*. Relying only on the complaint's allegations as to the manner in which the judge issued his order, the court held WACO stated a claim. (App. A-5) The failure of the Court of Appeal to address the threshold issue of whether the judge's act was within his jurisdiction, not only contradicts *Stump* and *Bradley*, but this Court's most recent statement of the doctrine of judicial immunity in *Forrester v. White*, 484 U.S. 219 [108 S.Ct. 538, 98 L.Ed.2d 555] (1988). *Forrester* reaffirmed that an act within the court's jurisdiction "does not become less judicial by virtue of an allegation of malice or corruption

of motive." *Id.* at 227 (citing *Bradley*, *supra*, 13 Wall. at 354). *Forrester* also observed the informal or *ex parte* nature of a proceeding does not deprive an act otherwise within a judge's jurisdiction of its judicial character. *Forrester*, *supra*, 484 U.S. at 227.

The California Constitution together with the state statutory scheme confer wide-reaching jurisdiction upon the Superior Court. Article VI, section 10 of the state constitution provides: "Superior courts have original jurisdiction in all causes except those given by statute to other trial courts." The state legislature has granted judges broad authority to enforce order in their courtrooms, provide for the orderly conduct of proceedings, and compel obedience to their judgments, orders and process. Cal. Code. Civ. Proc. §§ 128(a), 177. That legislature has also bestowed upon judges comprehensive powers to exercise this control: "any suitable process or mode of proceeding may be adopted which may appear most conformable to the spirit of this code." Cal. Code Civ. Proc. § 187.

Given the broad jurisdictional powers of California judges to control the orderly conduct of proceedings held before them and compel obedience to their orders and process, it may not be reasonably argued Judge MIRELES acted in the clear absence of all jurisdiction. In fact, the Ninth Circuit opinion does not even purport to so conclude and engages in no analysis from which it could make such a determination. WACO, himself, makes no allegation the judge was not acting within his jurisdiction. The allegation against Judge MIRELES is only that he acted unreasonably in making his order because it directed the officers to bring WACO into the courtroom using "excessive force." Accepting WACO's allegation as true for pleading purposes the opinion

asserts, without explanation, WACO could prove the judge acted outside his "judicial capacity." (App. A-5)

Such a conclusion defies the prescribed analysis integral to the determination of whether or not the doctrine of judicial immunity applies. Where a court has jurisdiction to issue an order in performance of its function as adjudicator of matters before it, including the management of its calendar and counsel representing the parties before the court, it cannot be said the judge lacks judicial capacity or that his acts may be converted to non-judicial status. *Bradley*, *supra*, 13 Wall. at 357; *Stump*, *supra*, 435 U.S. at 359; *Forrester*, *supra*, 484 U.S. at 225-26. As the *Bradley* court wrote, while assessing the judicial function of a judge in disbarring a lawyer for complaining to that judge about his treatment from the bench without notice of any kind:

> "[T]his erroneous manner in which [the court's] jurisdiction was exercised, however it may have affected the validity of the act, did not make the act any less a judicial act; nor did it render the defendant liable to answer in damages for it at the suit of the plaintiff, as though the court had proceeded without having any jurisdiction whatever. . ." *Bradley*, *supra*, 13 Wall. at 357.

This Court's most recent discussion of absolute judicial immunity set forth in *Forrester*, which holds qualified immunity shall be the rule in the context of employment determinations within a judge's authority, makes it clear that it is the function the judge exercised which determines whether he is entitled to absolute immunity. *Forrester*, *supra*, 484 U.S. at 227. Likewise, *Forrester* instructs that judges have absolute immunity for the "paradigmatic" judicial acts involved in resolving

disputes before them and in that context the doctrine is not controversial. *Id.* While some acts within the authority of a judge may be non-judicial, entitling the judge only to qualified immunity, a judge ordering police officers to bring counsel of record into court on a matter scheduled on the court's calendar cannot be characterized as non-judicial or outside the paradigmatic judicial acts involved in conducting the cases before him.

The authority relied upon by the Ninth Circuit for its decision, *Gregory v. Thompson*, 500 F.2d 59 (CA9 1974), does not support the court's conclusion. In *Gregory*, the judge came down from the bench and physically ejected a lawyer from the courtroom. *Id.* at 64-65. It is precisely the judge's personal use of physical force in *Gregory* that determines the conduct of the judge there was not a part of the court's judicial function. Review of the *Gregory* opinion and this Court's discussion of it in *Stump* both establish *Gregory* is limited to a judge's personal use of physical force and cannot be read to support the Ninth Circuit's citation of it. *Stump* refers to *Gregory* for the proposition that "the actual eviction of someone from the courtroom by use of physical force, a task normally performed by a sheriff or bailiff, was 'simply not an act of a judicial nature.' " *Stump*, *supra*, 435 U.S. at 361, n.10 (quoting *Gregory*, *supra*, 500 F.2d at 64.) The Court of Appeals' decision in this case clearly misreads both *Stump* and *Gregory*. Judge MIRELES engaged in no personal use of physical force. A judge who issues an order exercises a judicial function, an act qualitatively different from the personal use of physical force against an attorney. Orders are within a judge's jurisdiction; physical altercations are not.

Moreover, the Ninth Circuit opinion fails to acknowledge that *Gregory* recognized even a judge who personally used physical force would be entitled to qualified immunity. *Gregory*, *supra*, 500 F.2d at 64-65. In that case, *Harlow v. Fitzgerald*, 475 U.S. 800, 814 [102 S.Ct. 2727, 73 L.Ed.2d 396] (1982) requires dismissal of claims against government officers at the earliest possible stage and a close examination of WACO's allegations. Under *Harlow* and *Anderson v. Creighton*, 483 U.S. 635 [107 S.Ct. 3034, 97 L.Ed.2d 523] (1987), WACO's general conclusionary assertions that his constitutional rights were violated by the manner in which the court issued its order and his artifice of characterizing the court's conduct as "unreasonable" or "excessive," without alleging acts performed, would be insufficient to state a claim.

Judge MIRELES did what judges in California are empowered to do: ordered a peace officer to secure the presence of counsel of record in a case scheduled for hearing in his courtroom. The policies on which this Court has expressly premised the doctrine of judicial immunity are overtly threatened by the Ninth Circuit opinion. By virtue of the decision of the Court of Appeals: a judge issuing an order from the bench concerning his calendar is not performing a judicial function; may be found to have done so without jurisdiction depending upon the form of the order; and is personally subject to a civil lawsuit, if it is later determined the manner in which he made the order was inappropriate according to another judge. This result directly subjects judges to considerations of personal interest in making their decisions, requires they act with excess of caution, results in judicial timidity and interferes with judicial independence. Yet, it is precisely

because of these consequences that "this Court has not been quick to find that federal legislation was meant to diminish the traditional common law protections extended to the judicial process. *Forrester*, *supra*, 484 U.S. at 225.

II.

NO OTHER COURT OF APPEALS HAS EVER HELD THAT THE MANNER IN WHICH A JUDGE EXERCISES JUDICIAL AUTHORITY WILL DESTROY THE JUDGE'S ABSOLUTE IMMUNITY FROM SUIT UNDER § 1983; SUCH A DECISION CREATES A CONFLICT WITH OTHER CIRCUIT COURTS AND MANDATES THE EXERCISE OF THIS COURT'S SUPERVISORY POWER.

The opinion of the Court of Appeals places the Ninth Circuit in conflict with the decisions of various other circuits on the issue of the relevancy of a judge's state of mind to the doctrine of judicial immunity and whether the manner in which a court exercises its jurisdiction can cause a judge to lose absolute immunity. As a result, the decision of the Ninth Circuit calls into question the decisions of this Court in *Stump* as well as *Dennis v. Sparks*, 449 U.S. 24 [101 S.Ct. 183, L.Ed.2d 185] (1980).

Gregory has been cited by numerous Federal courts. No circuit has held, as the opinion below does, that based on *Gregory* a judge may lose his absolute immunity as a consequence of the manner in which he issues an order controlling the appearance of counsel in a proceeding before him. See e.g., *Slotnick v. Garfinkle*, 632 F.2d 163, 166 (CA1 1980); *Green v. Maraio*, 722 F.2d 1013, 1018, n.8 (CA2 1983); *Albright v. R. J. Reynolds Tobacco Co.*, 463 F.Supp. 1220, 1230 (W.D. PA 1979); *Liles v. Reagan*, 804 F.2d 493, 495 (CA8

1986). *Stump* explicitly observed, that in contradiction to the Ninth Circuit opinion below, the relevant issue in *Gregory* was an actual physical assault personally committed by the judge. *Stump*, *supra*, 435 U.S. at 361 n.10.

In the context of claims that judges participated in conspiracies, both the Fifth and Eleventh circuits have explicitly held even such an allegation as to the state of mind of a judge is inadequate to destroy the judge's absolute immunity. *Dykes v. Hosemann*, 776 F.2d 942 (CA11 1985) (en banc); *Holloway v. Walker*, 765 F.2d 517 (CA5), cert. denied, 474 U.S. 1037 [106 S.Ct. 605, 88 L.Ed.2d 583] (1985). Both of those decisions cite *Dennis v. Sparks*, 449 U.S. 24 [101 S.Ct. 183, 66 L.Ed.2d 185] (1980), a case involving an allegation of conspiracy between a judge and several other defendants, in which this Court held the judge had been properly dismissed from the conspiracy suit because of his absolute immunity. *Id.* at 27. In *Ashelman v. Pope*, 793 F.2d 1072, 1077 (CA9 1986) (en banc), the Ninth Circuit stated the "precedential strength" of the statement *Dykes* and *Holloway* relied on from *Dennis v. Sparks* was in its view "debatable." *Id.* at 1077, n.2. Like the opinion of the Ninth Circuit below this pronouncement from *Ashelman* is inconsistent with this Court's rationale in *Dennis* and *Stump*.

CONCLUSION

For the foregoing reasons, this Court should issue a writ of certiorari to the Ninth Circuit Court of Appeal to review its judgment and opinion in this action.

TONI RAE BRUNO
Attorney of Record for Petitioner
RAYMOND MIRELES

CHASE, ROTCHFORD, DRUKKER & BOGUST
700 SOUTH FLOWER STREET
FIFTH FLOOR
LOS ANGELES, CALIFORNIA 90017
TELEPHONE: (213) 626-8711

JOHN A. DALY
DAVID LINK
CHASE, ROTCHFORD, DRUKKER & BOGUST
Attorneys for Petitioner
RAYMOND MIRELES

APPENDICES

Howard WACO, Plaintiff-Appellant,

v.

Gregory BALTAD, Defendant,

Raymond Mireles, Defendant-Appellee.

No. 90-55683.

United States Court of Appeals,

Ninth Circuit.

Submitted May 15, 1991*.

Decided May 24, 1991.

Attorney sued state court judge, alleging that judge allegedly authorized the use of excessive force against attorney. The United States District Court for the Central District of California, Terry J. Hatter, Jr., J., dismissed the action for failure to state a claim, and attorney appealed. The Court of Appeals held that attorney's claim was not necessarily barred by absolute judicial immunity.

Reversed and remanded.

1. Federal Courts ⇐776

Court of Appeals reviews de novo district court's dismissal for failure to state claim.

2. Federal Civil Procedure ⇐1772

Dismissal for failure to state claim is appropriate only if plaintiff can prove no set of facts which would entitle him to relief.

* The panel finds this case appropriate for submission without oral argument pursuant to Ninth Circuit Rule 34-4 and Fed.R.App.P. 34(a).

APPENDIX A

3. Federal Civil Procedure ⇐1829

When party moves for dismissal for failure to state claim, allegations in complaint are taken as true and are construed in light most favorable to nonmoving party.

4. Civil Rights ⇐238

Absolute judicial immunity did not necessarily bar attorney's claim against state court judge arising out of police officers' alleged use of excessive force to seize and bring attorney into judge's courtroom; attorney's allegations were sufficient to withstand motion to dismiss, as judge would not have been acting in his judicial capacity if he requested and authorized use of excessive force. 42 U.S.C.A. § 1983.

Hugh R. Manes, Los Angeles, Cal., for plaintiff-appellant.

John A. Daly and Joan E. Hewitt, Chase, Rotchford, Drukker & Bogust, Los Angeles, Cal., for defendant-appellee.

Appeal from the United States District Court for the Central District of California.

Before PREGERSON, BRUNETTI and NELSON, Circuit Judges.

PER CURIAM:

Howard Waco, a Los Angeles County public defender, appeals th district court's dismissal of his action for damages against California Superior Court Judge Raymond Mireles for failure to state a claim. Because the district court directed entry of final judgment as to Judge Mireles pursuant to Fed.R.Civ.P. 54(b), we

have jurisdiction over Waco's appeal.[1] We reverse and remand.

[1-3] We review de novo a district court's dismissal for failure to state a claim. *Noll v. Carlson,* 809 F.2d 1446, 1447 (9th Cir.1987). Dismissal is appropriate only if the plaintiff "can prove no set of facts which would entitle him to relief." *Gibson v. United States*, 781 F.2d 1334, 1337 (9th Cir.1986), *cert. denied*, 479 U.S. 1054, 107 S.Ct. 928, 93 L.Ed.2d 979 (1987). The allegations in the complaint are taken as true and are construed in the light most favorable to the nonmoving party. *Love v. United States*, 915 F.2d 1242, 1245 (9th Cir.1989).

Judges are absolutely immune from section 1983 liability for damages only for their judicial acts and not for other administrative, legislative, or executive functions that they may perform. *Forrester v. White*, 484 U.S. 219, 227, 108 S.Ct. 538, 544, 98 L.Ed.2d 555 (1988). An act is judicial when it is a "function normally performed by a judge [and the parties] dealt with the judge in his judicial capacity." *Stump v. Sparkman*, 435 U.S. 349, 360, 98 S.Ct. 1099, 1106, 55 L.Ed.2d 331 (1978); *accord Ashelman v. Pope,* 793 F.2d 1072, 1075-76 (9th Cir.1986) (en banc).

Absolute immunity protects judges from liability for their judicial acts "even when such acts are in excess of their jurisdiction, and are alleged to have been done maliciously or corruptly." *Stump,* 435 U.S. at 356, 98 S.Ct. at 1104. If the act is judicial, judges are subject to liability only when they act in th clear absence of all jurisdiction. *Id.* at 356-57, 98 S.Ct. at 1105.

In this complaint, Waco alleged that after he failed to appear for the initial call of Judge Mireles's morning

[1] Waco's action against police officers Baltad and Titiriga is still pending in district court.

calendar, the judge, "angered by the absence of attorneys from his courtroom . . . ordered [two police officers employed by the City of Los Angeles] . . . to forcibly and with excessive force seize and bring" Waco into his courtroom. The police officers allegedly went into another courtroom, where Waco was representing another client, and forcibly dragged him out of that courtroom. Waco further alleges that the police officers slammed him into the walls, shouted obscenities at him, and slammed him through the doors into Judge Mireles's courtroom.[2]

In support of his argument that Mireles's act was not judicial, Waco cites *Gregory v. Thompson,* 500 F.2d 59 (9th Cir.1974). In *Gregory*, this court held that when judges themselves use physical force to preserve order, they are not entitled to absolute immunity, although they may be entitled to a defense of qualified immunity. 500 F.2d at 61; 64-65 (judge asked person to leave his courtroom and, after person refused, judge physically removed him). Although the *Gregory* judge would have retained his absolute immunity if he had directed a sheriff to remove the person, he lost his immunity because he performed an act "similar to that normally performed by a sheriff or bailiff." *Id.* at 65. This court suggested that a judge also could lose his immunity if he directed a sheriff or bailiff to use excessive force. *Id.* at 65 n. 6 (dictum); *accord Ammons v. Baldwin*, 705 F.2d 1445, 1448 (5th Cir.1983) (judge's threat to use physical force on litigant "strays too far from th normal conduct of a judge to enjoy immunity") (citing *Gregory*, 500 F.2d

[2] In his complaint, Waco states that the defendants knew or should have known that his only case before Judge Mireles involved a client, Johnny Lee Smith, who was in the custody of the Sheriff's Department. According to Waco, the Sheriff's Department had failed to bring Smith to court that morning and was unable to deliver him until 1:30 p.m.

at 64), *cert. denied*, 465 U.S. 1006, 104 S.Ct. 999, 79 L.Ed.2d 232 (1984); *see also Rosenthal v. Justices of the Supreme Court of California*, 910 F.2d 561, 566 (9th Cir.1990) (cites *Gregory* as an example of when a judge's conduct is not a judicial act), *cert. denied,* ___ U.S. ___, 111 S.Ct. 963, 112 L.Ed.2d 1050 (1991).

[4] Judges Mireles would retain his absolute immunity if he merely directed the officers to bring Waco to his courtroom without directing them to use excessive force. *Gregory*, 500 F.2d at 64-65 & n. 6. Here, however, Waco alleges that the judge "ordered [the police officers] to forcibly and with excessive force" bring Waco into his courtroom. If Judge Mireles requested and authorized the use of excessive force, then he would not be acting in his judicial capacity. *Id.* Taking the allegations in Waco's complaint as true, we cannot say that he can prove no set of facts in support of his claim. *See Love*, 915 F.2d at 1245; *Gibson*, 781 F.2d at 1337. Accordingly, we reverse the judgment of the district court.

Reversed and remanded.

HUGH R. MANES
MANES & WATSON
3600 Wilshire Boulevard
Suite 1710
Los Angeles, California 90010
Telephone: (213) 381-7793

Attorneys for plaintiff

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

HOWARD WACO, Plaintiff, vs. GREGORY BALTAD, Ser. #23330, individually and as a police officer; NICHOLAS TITIRIGA, Ser. #22146, individually and as a police officer; RAYMOND MIRELES, individually, Defendants.	CASE NO. 89 6970 TJH(JRx) COMPLAINT FOR DAMAGES (Title 42 U.S.C. §1983) Violation of Federal Civil Rights PLAINTIFF DEMANDS A JURY TRIAL

Plaintiff alleges:

JURISDICTION

1. This cause of action is brought by plaintiff under Title 42 U.S.C. §1983 for redress of a deprivation under color of law of a right, privilege or immunity secured to plaintiff by the Fourth, Sixth and Fourteenth Amendments to the United States Constitution.

2. The jurisdiction of this Court is invoked under Title 28 U.S.C. §1343(a)(4).

PARTIES

3. Plaintiff is a citizen of the United States, and a resident of the County of Los Angeles, State of California.

At all times herein mentioned plaintiff was and still is an attorney duly licensed to practice law in all the Courts of the State of California, and is and for the past twenty-four years he has been a public defender, and at all times herein mentioned he was assigned to the Criminal Courts in Van Nuys, California.

4. At all times herein mentioned defendants GREGORY BALTAD, Ser. #23330 and NICHOLAS TITIRIGA, Ser. #22146, were each duly appointed, qualified and acting police officers duly employed as such by the City of Los Angeles; and at all times herein mentioned each said defendant was acting in the course and scope of such employment and under color of state law, and as the employee, agent and representative of every other defendant herein.

5. At all times herein mentioned defendant RAYMOND MIRELES was a duly appointed, qualified and acting judge of the Superior Court of the State of California for the County of Los Angeles, duly assigned to and presiding in Department Northwest "T" of said Court, in Van Nuys, California; and at all times herein mentioned said defendant was acting under color of state law, and as the employee, agent and representative of every other defendant herein.

VIOLATION OF FEDERAL CIVIL RIGHTS

6. The acts, omissions and events herein complained of occurred on or about November 6, 1989, between about 9:30 A.M. and 10:00 A.M., on the seventh floor of the Superior Court building at 6230 Sylmar Avenue, in Van Nuys, California.

7. At about the aforementioned date, time and place, defendants each knowingly and wilfully, and under color of state law, conspired and agreed to and pursuant thereto each defendant did knowingly and wilfully and under color of state law deprive plaintiff of rights, privileges and immunities secured to him by the Fourth, Sixth and Fourteenth Amendments to the United States Constitution, by knowingly and wilfully and under color of law engaging in the following acts and omissions, to wit:

a) Defendant MIRELES, angered by the absence of attorneys from his courtroom at the initial call of his morning calendar, and acting without probable cause nor upon information supported by oath or affirmation, ordered defendants BALTAD and TITIRIGA to forcibly and with excessive force seize and bring plaintiff into his courtroom, although as defendants each knew or in the exercise of due care they each should have known, plaintiff's only case in that court that morning involved a client, Johnny Lee Smith, who was in the custody of the Sheriff's Department, which had failed to bring Smith to court that morning, and would be unable to do so before 1:30 P.M., if then, thereby rendering impossible any substantive proceedings in said Court affecting Smith's interests before that time.

b) At about the time said seizure order was given by defendant MIRELES, and was executed by defendants BALTAD and TITIRIGA, plaintiff—as defendants each at all times knew or in the exercise of due care should have known—was then and there actively representing and appearing for another client, who was present in court, on a warrant matter in Department "M," at the other end of the hall, wherein Judge Alan Haber was then presiding, and which court was then in session.

c) Pursuant to said order of defendant MIRELES, defendants BALTAD and TITIRIGA, who were witnesses in plaintiff's said Smith case, entered Department M, and while that Court was in session, and while plaintiff was waiting to appear before said Court on said warrant matter which the Court intended to address momentarily, said defendants BALTAD and TITIRIGA, without a warrant or lawful authority, as they each knew or in the exercise of due care should have known, did then and there by means of unreasonable force and violence seize plaintiff and remove him backwards from Department M, down the hall, cursing plaintiff and calling him vulgar and offensive names; then, said defendant officers deliberately, recklessly and without necessity slammed plaintiff violently against and through the doors to Department "T," and intentionally and without necessity through the swinging gates within said Courtroom, all in the presence and view of defendant MIRELES, who thereafter knowingly and deliberately approved and ratified each of the aforedescribed acts of said defendant officers.

DAMAGES

8. By reason of the aforedescribed acts of defendants, and each of them, plaintiff sustained great bodily injury, pain and suffering, shock to his nervous system, a huge and painful bruise and abrasion to his lower left leg, pain, abrasions and contusions to his back, arms, shoulders and body, great anxiety, mental anguish, torment, humiliation, embarrassment, severe emotional distress, loss and diminution of sleep and appetite, and impairment of his professional and personal dignity, prestige and standing, and by reason of the foregoing, plaintiff sustained general damages in the sum of $250,000.

9. By reason of the aforedescribed acts and omissions of defendants and each of them, plaintiff was and, on information and belief, he will in the future be required to receive medical care and treatment, and by reason thereof he has incurred and will in the future incur hospital, doctor, x-ray, medical, pharmaceutical, therapy, and incidental expense, all to his damage in an amount as proved.

10. By reason of the aforedescribed acts and omissions of defendants and each of them, plaintiff lost and will in the future be required to lose time from work and from his professional duties, and by reason thereof he sustained and will sustain in the future a loss of earnings and earning capacity in an amount as proved.

11. The aforedescribed acts of each defendant was done knowingly, deliberately, maliciously and in reckless disregard of plaintiff's civil rights and liberty, and to oppress, injure and harass him; and by reason thereof, defendants BALTAD and TITIRIGA should be required to pay plaintiff punitive and exemplary damages in the sum of $25,000 each; and defendant MIRELES should be required to pay plaintiff punitive and exemplary damages in the sum of $100,000.

12. By reason of the aforedescribed acts and omissions of defendants and each of them, plaintiff was required to retain the services of an attorney to prosecute this action to vindicate the aforedescribed abridgement of his constitutional and civil rights; and he therefore requests that defendants be required to pay plaintiff and his attorneys reasonable attorney's fees and costs incurred herein.

WHEREFORE, plaintiff prays for judgment against defendants and each of them as follows;

1. General damages in the sum of $250,000;

2. Medical and incidental expenses in an amount as proved;

3. Loss of earnings in an amount as proved;

4. Punitive and exemplary damages against and from defendants BALTAD and TITIRIGA in the sum of $25,000 each;

5. Punitive and exemplary damages against and from defendant MIRELES in the sum of $100,000;

6. Costs of this litigation;

7. Reasonable attorney's fees;

8. Such other and further relief as the Court deems appropriate and just.

DATED: November 28, 1989

MANES & WATSON

By _____
HUGH R. MANES
Attorneys for plaintiff

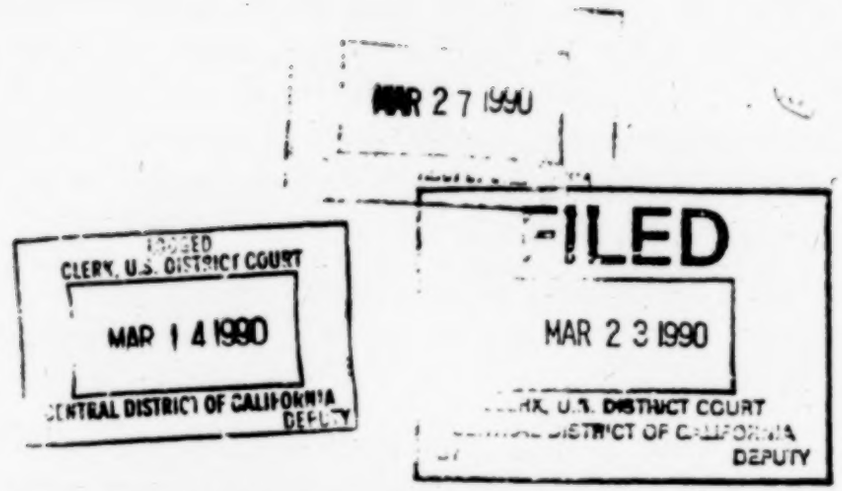
JURY DEMAND

Plaintiff demands a jury trial.

DATED: November 28, 1989

MANES & WATSON

By _____
HUGH R. MANES
Attorneys for plaintiff



LADELL HULET MUHLESTEIN, ESQ.
CHASE, ROTHCHFORD, DRUKKER & BOGUST
A Law Corporation
700 South Flower Street, Fifth Floor
Los Angeles, California 90017
(213) 626-8711
Attorneys for Defendant,
HONORABLE RAYMOND MIRELES

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

HOWARD WACO, Plaintiff, vs. GREGORY BALTAD, Ser. #23330, individually and as a police officer; NICHOLAS TITIRIGA, Ser. #22146, individually and as a police officer; RAYMOND MIRELES, individually, Defendants.	CASE NO. CV 90-6970 THJ (Jrx) ORDER OF DISMISSAL (PROPOSED)

APPENDIX C

This matter having come before the Court on February 26, 1990, upon the motion of Defendant, Honorable Raymond Mireles, to dismiss Plaintiff's Complaint, pursuant to Federal Rules of Civil Procedure, Rule 12(b)(1) and (6), before the Honorable Terry J. Hatter, Jr., Judge Presiding; and

The Court having considered the moving papers and written opposition thereto, as well as oral argument; and

The Court having determined that Plaintiff's Complaint, however liberally construed, fails to state a claim upon which relief can be granted;

THEREFORE, IT IS HEREBY ORDERED that the Complaint of Plaintiff Howard C. Waco be and is dismissed against Defendant, Honorable Raymond Mireles.

DATED: March 23, 1990

TERRY J. HATTER, JR.

Judge Terry J. Hatter
United States District Court

Prepared by:

CHASE, ROTCHFORD, DRUKKER & BOGUST
A Law Corporation

By: Ladell H. Muhlestein
LADELL HULET MUHLESTEIN
Attorneys for Defendant,
Honorable Raymond Mireles

PROOF OF SERVICE BY MAIL

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the county of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is 700 South Flower Street, 5th Floor, Los Angeles, California 90017.

On March 13, 19 90, I served the foregoing document described as ORDER OF DISMISSAL (PROPOSED) on plaintiff's counsel in this action by placing a true copy thereof enclosed in a sealed envelop with postage hereon fully prepaid in the United States mail at Los Angeles, California addressed as follows:

Hugh R. Manes, Esq.
MANES & WATSON
3600 Wilshire Boulevard
Suite 1710
Los Angeles, California 90010

Executed on March 13, 19 90 at Los Angeles, California.
(check applicable paragraph below)

☐ (State) I declare under penalty of perjury that the above is true and correct.

☐ (Federal) I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

(Signature)
MARGARITA G. TRIMOR

HUGH R. MANES
MANES & WATSON
3600 Wilshire Boulevard
Suite 1710
Los Angeles, California 90010
Telephone: (213) 381-7793

Attorneys for plaintiff

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

HOWARD WACO, Plaintiff, vs. GREGORY BALTAD, etc., et al., Defendants.	CASE NO. CV 89-6970 TJH (Jrx) ORDER OF DISMISSAL AND FOR ENTRY OF FINAL JUDGMENT (F.R.Civ.P., Rules 54(b) and 12(b)(1) and (6)).

This matter having come before the Court on February 26, 1990, upon the motion of Defendant, Honorable RAYMOND MIRELES, to dismiss Plaintiff's Complaint, pursuant to Federal Rules of Civil Procedure, Rule

APPENDIX D

12(b)(1) and (6), before the Honorable Terry J. Hatter, Jr., Judge Presiding; and

The Court having considered the moving papers and written opposition thereto, as well as oral argument; and

The Court having determined that Plaintiff's Complaint, however liberally construed, fails to state a claim upon which relief can be granted;

THEREFORE, IT IS HEREBY ORDERED that the Complaint herein be and it is dismissed as against Defendant RAYMOND MIRELES—and him only.

The Court has determined that this order should be entered as a final judgment in that the ultimate determination of the remainder of the case in the trial court against Defendants GREGORY BALTAD and NICHOLAS TITIRIGA involves separable issues and is likely to consume more time than the appeal from this order; and further, that an immediate appeal from this Order of Dismissal may materially advance the ultimate termination of the litigation and, in th final analysis could conserve judicial time; and further, the issue presented by the Court's ruling is one of great public interest and importance, that is, whether complete judicial immunity extends to a judge's order to a police officer, appearing in his court as a witness, to use excessive force on the defense lawyer in the case;

THEREFORE, pursuant to Rule 54(b), F.R.Civ.P.,

IT IS HEREBY ORDERED AND DIRECTED that this Order of Dismissal be entered as a Final Judgment of Dismissal as to said Defendant RAYMOND MIRELES.

DATED: APR 2 2 1990

TERRY J. HATTER, JR.

JUDGE, UNITED STATES DISTRICT COURT

PROOF OF SERVICE BY MAIL

I, the undersigned, say: I am over the age of 18 years and not a party to the within action or proceeding. My business address is 3600 Wilshire Boulevard, Suite 1710, Los Angeles, California 90010.

On April 11, 1990, I served the within

ORDER OF DISMISSAL AND FOR ENTRY OF FINAL JUDGMENT

on the defendants in this action, by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid in the United States mail at Los Angeles, California, addressed as follows:

John Daly, Esq.
Chase, Rotchford, Drukker & Bogust
Fifth Floor
700 South Flower Street
Los Angeles, California 90017

JAMES K. KAHN, City Attorney
LINDA K. LEFKOWITZ, Supervising Attorney
DONNA WEISZ JONES, Deputy City Attorney
1800 City Hall East
200 North Main Street
Los Angeles, CA 90012

I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

Executed on April 11, 1990, at Los Angeles, California.

SHARON BOAZ

PROOF OF SERVICE BY MAIL

State of California

ss.

County of Los Angeles

I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and a resident of the County of Los Angeles, over the age of eighteen (18) years and not a party to the within action or proceeding; that my business address is 11852 Santa Monica Boulevard, Suite 3, Los Angeles, California 90025; that on August 19, 1991, I served the within ***Petition for Writ of Certiorari*** in said action or proceeding by depositing true copies thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Los Angeles, California, addressed as follows:

Clerk, United States
Supreme Court
One First Street, N.E.
Washington, D.C. 20543
(By Express Mail: original and forty copies)

Clerk, U.S. Court of Appeals
Ninth Judicial Circuit
50 United Nations Plaza
Room 59
San Francisco, California
94102-4909
(415) 556-8011

Clerk, United States District
Court for the
Honorable Terry J. Hatter
Central District
United States Courthouse
312 North Spring Street
Los Angeles, California 90012
(213) 894-5276

HUGH R. MANES
MANES & WATSON
(Counsel for Howard Waco)
3600 Wilshire Boulevard
Suite 1710
Los Angeles, California 90010
(213) 381-7793

JAMES K. HAHN,
City Attorney
BLANCA Z. HADAR,
Deputy City Attorney
(Counsel for Officers Gregory
Baltad and Nicholas Titiriga)
1800 City Hall East
200 North Main Street
Los Angeles, California 90012
(213) 485-5408

I declare under penalty of perjury that the foregoing is true and correct. Executed on August 19, 1991, at Los Angeles, California.

Betty J. Malloy
(Original signed)

No. 91-311

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

RAYMOND MIRELES,
Petitioner,
vs.
HOWARD WACO,
Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

HUGH R. MANES
Counsel of Record

MANES & WATSON

Suite 1710
3600 Wilshire Boulevard
Los Angeles, California 90017
(213) 381-7793

SAM ROSENWEIN
Of Counsel

Attorneys for Respondent

Lawyers Brief Service • Appellate Brief Printers • (213) 383-4457 • (714) 720-1510

QUESTIONS PRESENTED

1. Does a judge who orders two police officers to bring into his courtroom forcibly and with excessive force an attorney then appearing in another courtroom, and who, upon observing the officers bring such attorney into his courtroom with unnecessary and unreasonable force, "knowingly and deliberately ratifies" that conduct, act without and in the absence of any jurisdiction?

2. Does a judge have absolute immunity when, in open court, he orders a police officer to use excessive force on an attorney, and when he subsequently ratifies such use of unreasonable force by the officer?

LIST OF PARTIES

Petitioner: RAYMOND MIRELES--Defendant-Appellee Waco v. Baltad, 934 F.2d 214 (9th Cir. 1991), United States Court of Appeals Ninth Circuit No. 90-55683; Waco v. Baltad, et al., United States District Court Central District of California No. CV 89-6970-TSH. Petitioner is a judge of the Superior Court of the State of California for the County of Los Angeles.

Respondent: HOWARD WACO--Plaintiff-Appellant Waco v. Baltad, 934 F.2d (9th Cir. 214 1991), United States Court of Appeals Ninth Circuit No. 90-55683; Waco v. Baltad, et al. United States District Court Central District of California No. CV-89-6970-TSH. Respondent is a Los Angeles County Deputy Public Defender.

While two additional defendants are parties to action No. 89-6970-TSH on file in the United States

District Court for the Central District, they were not parties to the proceeding in the United States Court of Appeals for the Ninth Circuit of California, those defendants are Gregory Baltad and Nicholas Titiriga, officers of the Los Angeles Police Department.

No corporation is a party to the proceedings.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases: **Page:**

No. 91-311

In the Supreme Court of the United States

October Term, 1991

RAYMOND MIRELES,

Petitioner,

v.

HOWARD WACO,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

The respondent, HOWARD WACO, respectfully requests that this Court deny the petition for writ of certiorari, seeking review of the Ninth Circuit's opinion in this case. That opinion is reported at 934 F.2d 214 (1991).

OPINIONS BELOW

The opinion of the Court of Appeals for the Ninth Circuit is reported in the official reports as *Waco* v.

Baltad, 934 F.2d 214 (CA9, 1991) and is contained in Petitioner's Appendix. The United States District Court issued no written opinion.

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on May 24, 1991.

The Petition for Writ of Certiorari was received by Respondent on the 20th of August, 1991.

Jurisdiction is conferred upon this Court pursuant to 28 U.S.C. §1254(l).

CONSTITUTIONAL PROVISIONS AND STATUTES

The following constitutional provisions and statutes are involved in this case:

Fourth Amendment, United States Constitution:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated; and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Title 42 United States Code, Section 1983:

> Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

REASONS WHY THE WRIT SHOULD BE DENIED

I.
THE RECORD AND THE DECISION BELOW ARE IGNORED IN THE QUESTIONS PRESENTED IN THE PETITION.

The Petition overlooks the rule, cited in the Ninth Circuit's Opinion, that in reviewing the dismissal of a complaint for failure to state a claim, "the allegations are taken as true and are construed in the light most favorable to the non-moving party." (Pet. A-3).

The question presented, therefore, is not merely whether the judge acted "unreasonably," or duly performed" a judicial function" (Pet. i), but whether the judge acted in the **clear absence** of all jurisdiction when

he "ordered" two police officers "to forcibly and with *excessive force* seize and bring" into Petitioner's courtroom the respondent, an attorney then appearing on behalf of another client before another judge in session down the hall, (Pet. B-3) (emphasis supplied); and when, pursuant to petitioner's orders said police officers do just that, and "by means of unreasonable force and violence" seized respondent, dragged him backwards down the hall, (Pet. B-4) then "deliberately, recklessly and without necessity slammed" respondent "violently against and through the doors" of the courtroom and through the inner swinging gates of the courtroom, all in the presence and view of petitioner who, seated upon his bench in open court, thereupon "knowingly and deliberately approved and ratified each of the aforedescribed acts" of excessive force of the two police officers (Pet. B-4).

a) The Ninth Circuit Opinion initially stated that judges may be absolutely immune from section 1983 liability for damages only for their *judicial* acts, "and not for other administrative, legislative or executive functions that they may perform" (Pet. A-3). The Opinion states that judges are subject to liability "when they act in the clear absence of all jurisdiction," citing this Court's decision in *Stump* v. *Sparkman*, 435 U.S. 349 at 356-57, 98 S.Ct. at 1105 (1978) (Pet. A-3). In its opinion, the Ninth Circuit noted that it had previously held that a judge who himself uses physical force to preserve order, loses his immunity, citing *Gregory* v. *Thompson*, 500 F.2d 59 (1974). In the same case the Ninth Circuit suggested that "a judge also

could lose his immunity if he directed a sheriff or bailiff to use excessive force" (Pet. A-4). The Ninth Circuit therefore impliedly recognized that the use of excessive force, or directions to use excessive force by police officers, in circumstances such as were alleged in the complaint herein, and legally admitted, could not possibly be condoned. The Ninth Circuit concluded that if respondent "requested and authorized the use of excessive force, then he would not be acting in his judicial capacity" (Pet. A-5), and ruled: "Taking the allegations in Waco's complaint as true, we cannot say that he can prove no set of facts in support of his claim" (Pet. A-5). The judgment of dismissal was reversed and the case remanded (Pet. A-5). Decision must await a full trial before an appropriate trier of the facts.

II.

THE PETITION PRESENTS NOT A SINGLE DECISION OR STATUTORY PROVISION WHICH AUTHORIZES A GRANT OF IMMUNITY TO A JUDGE WHO DIRECTS AND RATIFIES THE USE OF EXCESSIVE FORCE, AS OUTLINED IN THE COMPLAINT, ALL MATERIAL FACTS ALLEGED HAVING BEEN ADMITTED BY PETITIONER'S MOTION TO DISMISS THE COMPLAINT.

The petitioner's citations deal solely with the general rules respecting absolute immunity for judges--when the function performed is normally performed by a judge

and is dealt with in his judicial capacity, and even when the acts of the judge are in excess of jurisdiction, and are alleged to have been done maliciously or corruptly. But the Petition cites not a single decision suggesting that a judge enjoys immunity when he directs the use of excessive force, and approves the use of force and violence as in the case herein.[1] In what follows, respondent briefly notes the rulings in each of the cases cited in the petition.

Bradley v. *Fisher*, 13 Wall 335, 20 L.Ed. 646 (1872) (lawyer insulted the judge and judge ordered lawyer stricken from rolls of court) (Pet. p. 5).

Stump v. *Sparkman*, 435 U.S. 349, 98 S.Ct. 1099, 55 L.Ed.2d 331 (1978) (failure to afford appropriate notice and hearing on sterilization issue. See fn. 10 referring to *Gregory* v. *Thompson*, 500 F.2d 59 (9th Cir., 1974) (Pet. pp. 5-6)).

---

[1] On the other hand, compare: *Zarcone* v. *Perry* 572 F.2d 52 (2nd Cir. 1978) which, at p. 57, characterizes a judicial abuse of power as intolerable where a judge ordered a sheriff to bring before him in handcuffs a coffee vendor who the judge then subjected to an inquisition all because he did not like the vendor's coffee. Compare also: *Lopez* v. *Vanderwater* 620 F.2d 1229, 1235-1237 (7th Cir. 1980) holding a judge liable for damages where he filed criminal charges against plaintiff, forged plaintiff's signature on a guilty plea, and then caused plaintiff to be brought up before him upon an unconstitutional conviction.

Forrester v. *White*, 484 U.S. 219, 108 S.Ct. 538, 98 L.Ed.2d 555 (1988) (Judge hired petitioner as probation officer; then fired her. Administrative decision held not entitled to absolute immunity. Question of qualified immunity not reached) (Pet. 6-7, 8-9).

Harlow v. *Fitzgerald*, 457 U.S. 800, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982) [2] (President enjoys absolute immunity; aides are entitled only to qualified immunity).

Anderson v. *Creighton*, 483 U.S. 635, 107 S.Ct. 3034, 97 L.Ed.2d 523 (1987) (federal law officer participates in an illegal search in violation of Fourth Amendment; held, entitled to qualified immunity only) (Pet. p. 10).

Dennis v. *Sparks*, 449 U.S. 24, 101 S.Ct. 183, 66 Ed.2d 185 (1980) (Judge issued an injunction--claim of corruption).

The lower court decisions cited in the petition also are not relevant: *Slotnick* v. *Garfunkle*, 632 F.2d. 163 (1st Cir. 1980) (contempt proceeding) (Pet. p. 11); *Green* v. *Maraio*, 722 F.2d 1013 (2nd Cir. 1983) (reporter and trial judge--claim of altering trial transcript) (Pet. p. 11); *Albright* v. *R. J. Reynolds Tobacco Co.*, 463 F.Supp. 1220 (W.D. Pa. 1979) (Claim of bias against plaintiff--judge approves ruling on Gregory) (Pet. p. 11); *Liles* v. *Reagan*, 804 F.2d 493

---

[2] There appears to be a typographical error in the petition. The citation should be 457 U.S., not 475 U.S.

(8th Cir. 1986) (defendant found in contempt of court and jailed) (Pet. 11-12); *Dykes* v. *Hosemann*, 776 F.2d 942 (11th Cir. 1985) (mother and son sue father and juvenile judge--charge of conspiracy to deprive constitutional rights) (Pet. p. 12); *Holloway* v. *Walker*, 765 F.2d 517 (5th Cir. 1985), cert. den. 474 U.S. 1037, 106 S.Ct. 605, 88 L.Ed.2d 583 (1985) (control of oil company--charge of bribe and conspiracy) (Pet. p. 12); *Ashelman* v. *Pope*, 793 F.2d 1072 (9th Cir. 1986) (defendant claims conspiracy by judge and prosecutor to deprive defendant of constitutional rights while defending himself in a criminal prosecution.) (Pet. p. 12)

Finally, it should be noted that petitioner concedes that "some acts within the authority of a judge may be non-judicial" (Pet. p. 9). The petitioner concedes that the Ninth Circuit ruling in *Gregory* v. *Thompson*, *supra* was correct. There is no absolute immunity for a judge who "came down from the bench and physically ejected a lawyer from the courtroom" (Pet. p. 9). But, argues the petitioner, when the judge "orders" police officers to use excessive force and drag a lawyer from one courtroom to the judge's courtroom, the police officers using force and violence all the way with the judge's approval, that order, the petitioner asserts, is within a judge's jurisdiction. The petitioner avoids quoting the actual directions of the judge, and fails to recognize that a judge who acts in a manner that precludes all resort to appellate or judicial remedies, who acts as if he were a police chief issuing orders to his men, can hardly deny that his actions were in clear absence of all jurisdiction.

CONCLUSION

For the aforesaid reasons, the petition for a writ of certiorari should be denied.

DATED: September 3, 1991

Respectfully submitted,

HUGH R. MANES
Counsel of Record
for Respondent HOWARD WACO

MANES & WATSON
3600 Wilshire Blvd., Ste. 1710
Los Angeles, California 90010
TELEPHONE: (213) 381-7793
Counsel for Respondent

SAM ROSENWEIN
Of Counsel

No. 91-311

In the Supreme Court of the United States

October Term, 1991

RAYMOND MIRELES,

Petitioner,

v.

HOWARD WACO,

Respondent.

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

TONI RAE BRUNO
Attorney of Record for Petitioner
RAYMOND MIRELES

CHASE, ROTCHFORD, DRUKKER & BOGUST
700 SOUTH FLOWER STREET
FIFTH FLOOR
LOS ANGELES, CALIFORNIA 90017
TELEPHONE: (213) 626-8711

JOHN A. DALY
DAVID LINK
CHASE, ROTCHFORD, DRUKKER & BOGUST
Attorneys for Petitioner
RAYMOND MIRELES

Westside Law Publishers Los Angeles, California (213) 207-0272

TABLE OF CONTENTS

TABLE OF AUTHORITIES CITED

No. 91-311

In the Supreme Court of the United States

October Term, 1991

RAYMOND MIRELES,

Petitioner,

v.

HOWARD WACO,

Respondent.

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Petitioner RAYMOND MIRELES hereby submits his reply to the Brief in Opposition to Petition for Writ of Certiorari filed by Respondent HOWARD WACO.

INTRODUCTION

WACO's brief in opposition concedes the determinative issue is whether MIRELES acted in the complete absence of jurisdiction. By so doing, WACO acknowledges Petitioner's reason for grant based on the conflict between the Ninth Circuit opinion in this case and *Stump v. Sparkman*, 435 U.S. 349 [98 S.Ct. 1099, 55 L.Ed.2d 331] (1978) is compelling. WACO's ensuing attempt to avoid the reasoned result of this concession by relying upon the allegations of his complaint fails. He further concedes that the solitary authority he cites to support this position, *Gregory v. Thompson*, 500

F.2d 59 (CA9 1974), did not hold conclusory allegations may abrogate judicial immunity. Instead, *Gregory* recognized that even a judge who personally used physical force would be entitled to qualified immunity absent an actual determination by a trier of fact that malice existed. *Id.* at 65. Consequently, in light of the rules of pleading adopted in *Harlow v. Fitzgerald*, 457 U.S. 800, 814 [102 S.Ct. 2727, 73 L.Ed.2d 396] (1982), WACO's allegations of "excessive force" cannot provide a basis on which to justify the Ninth Circuit opinion. Moreover, assuming, without conceding, the conclusory allegations of the complaint may be deemed to overcome judicial immunity in any form, WACO entirely fails to explain how the conduct he asserts MIRELES engaged in could have been under color of state law so as to constitute a violation of 42 U.S.C. § 1983.

Similarly, WACO's effort to answer the petition's reasons for grant by asserting the authority relied upon includes no case which holds a judge enjoys immunity when he directs the use of excessive force begs the question. The authority relied upon in the petition is the controlling law which sets forth the parameters of the doctrine of judicial immunity. When those guidelines are applied to the instant case and the opinion issued by the Ninth Circuit, it becomes apparent the decision reached by that court is impermissibly in conflict with the applicable case law of this Court as well as the decision of the Fourth Circuit in *Mullins v. Oakley*, 437 F.2d 1217 (CA4 1971). *Mullins*, contrary to WACO's suggestion no such authority exists, expressly holds a judge is absolutely immune where he orders counsel to be brought before him forcibly. *Id.* at 1217-18.

ARGUMENT

I.

WACO MAY NOT RELY ON HIS LEGALLY INSUFFICIENT ALLEGATIONS TO DEFEAT JUDICIAL IMMUNITY.

Relying on *Gregory*, *supra*, 500 F.2d at p. 59, WACO blatantly recites that the sole legal justification for the Ninth Circuit opinion is found in his conclusory allegations of excessive force. Not only is such an approach contrary to law; it finds no support in *Gregory* and, in fact, conflicts with that case. WACO argues his allegations are to be accepted uncritically by the court. While it is accurate to state allegations are to be accepted as true at the pleading stage, that general rule does not respond to the relevant inquiry of whether the allegations are sufficient. Such is particularly the case where the issue is immunity under 42 U.S.C. § 1983.

The Ninth Circuit opinion indulges in the same error of law WACO urges here. The brief per curium opinion permitted WACO to proceed with his 1983 action against Judge MIRELES without considering that court's jurisdiction to make the order complained of or employing a functional approach to determine whether his acts were judicial in character as required by this court's decision in *Forrester v. White*, 484 U.S. 219, 227-28 [108 S.Ct. 538, 98 L.Ed.2d 555] (1988). The opinion simply recites the judge "lost" his absolute immunity and cites *Gregory* (App. A 2-3) without discussing whether the judge was entitled to qualified immunity. The Ninth Circuit did so despite the fact that *Gregory* recognized a judge who personally used physical force would be entitled to qualified immunity and only affirmed the verdict after observing the jury found actual malice. *Gregory*, *supra*, 500 F.2d at 64-65. *Gregory* made no determination as to the sufficiency of allegations to support a claim such as that asserted by WACO. To the contrary, by acknowledging qualified immunity applied under the

circumstances of that case, the *Gregory* court placed in issue this Court's requirement of specificity in pleading of claims subject to the qualified immunity defense. Given the conclusory allegations of WACO's complaint, had the circuit court proceeded to apply the doctrine of qualified immunity as required by case law, the controlling authority dictates WACO's claim be dismissed.

Recognizing the policy of enabling federal courts to dismiss meritless claims against governmental officials at the earliest possible stage of litigation, *Harlow v. Fitzgerald*, 457 U.S. 800, 814 [102 S.Ct. 2727, 73 L.Ed.2d 396] (1982) adopted the test to be applied to the pleading of claims subject to the qualified immunity defense. That policy was reaffirmed in *Anderson v. Creighton*, 483 U.S. 635, 645 [107 S.Ct. 3034, 97 L.Ed.2d 523] (1987). In the words of this Court in *Harlow*, "bare allegations of malice should not be enough to subject government officials either to the costs of trial or to the burdens of broad-reaching discovery." *Harlow*, *supra*, 457 U.S. at 817-18; cf. *Siegert v. Gilley*, ___ U.S. ___ [111 S.Ct. 1789, 1795, 114 L.Ed.2d 277] (1991) (Kennedy, J., concurring). In order to survive a motion to dismiss where qualified immunity is in issue, a plaintiff must plead nonconclusory allegations setting forth specific evidence of unlawful intent. *Branch v. Tunnell*, 937 F.2d 1382, 1386 (CA9 1991).

A look at WACO's allegations demonstrates they are merely conclusory, totally insufficient and cannot be construed to plead specific facts or evidence. The complaint fails to allege any particular violation of any specific right clearly established under the fourth, sixth or fourteenth amendments to the United States Constitution as required by *Harlow* and *Siegert*. Further, no facts whatever are alleged as to the manner in which any violation of any constitutional amendment occurred. *Harlow*, *supra*, 457 U.S. at 818; *Siegert*, *supra*, 111 S.Ct. at 1794. Nor are there specific facts alleged as to any conduct on the part of Judge MIRELES. The complaint avers only that the officers were ordered to use "excessive force," no more than a subjectively descriptive conclusion.

The only other reference to the judge's conduct is recitation of the legal conclusion MIRELES "ratified" the officers' actions without reference to any fact to support it. The only allegations of force which even purport to set forth facts are confined to the officers. Pursuant to *Harlow* and *Siegert*, as applied in *Branch*, such conclusory allegations set forth no specific facts sufficient to survive a motion to dismiss.

The heightened pleading standard from the qualified immunity context of *Harlow* and its progeny is even more essential to pleading of claims which call into issue the defense of absolute judicial immunity. To hold otherwise would render absolute judicial immunity for acts of a judge within his jurisdiction conditional and abrogate the very policies which are the bases of that doctrine.

II.

WERE ONE TO ASSUME WACO'S ALLEGATIONS SUFFICIENT TO OVERCOME JUDICIAL IMMUNITY AT THE PLEADING STAGE, WACO HAS NOT PRESENTED, AND CANNOT PRESENT, ANY BASIS ON WHICH TO CONCLUDE SUCH ALLEGATIONS STATE A CLAIM FOR VIOLATION OF 42 U.S.C. §1983.

WACO's entire argument that MIRELES may not avail himself of the defense of absolute judicial immunity is premised upon the proposition that the judge acted in the clear absence of all jurisdiction. This same proposition is the basis on which WACO defends the Ninth Circuit opinion. Yet, it is this proposition which provides still an added reason for grant of the petition which is made apparent by WACO's brief in opposition. By virtue of the Ninth Circuit's holding and its conclusion that WACO has stated a claim for violation of 42 U.S.C. § 1983, the Ninth Circuit has determined Judge MIRELES acted under color of state law though he acted in the clear absence of all jurisdiction. Thus, the opinion

presents an important question of federal law which has not been, but should be decided by this Court.

This Court's landmark judicial immunity case *Stump v. Sparkman*, *supra*, 435 U.S. 349 left open the question of whether a judge who acted without any jurisdiction whatsoever and was, therefore, not entitled to immunity could meet the under color of law requirement for suit under section 1983. *Id.* at 360, 369 n. 6 (Stewart, J., dissenting). The leading cases of this court which have dealt with the "under color of law" requirement have primarily involved the conduct of police officers. *Monroe v. Pape*, 365 U.S. 167 [81 S.Ct. 473, 5 L.Ed.2d 492] (1962); *Screws v. United States*, 325 U.S. 91 [65 S.Ct. 1031, 89 L.Ed. 1495] (1945); *United States v. Classic*, 313 U.S. 299 [61 S.Ct. 1031, 85 L.Ed. 1368] (1941). Those cases have held that officers acting pursuant to their assigned duties were acting under color of law even though they violated certain state statutes because they were "clothed with the authority of state law." *Monroe v. Pape*, *supra*, 365 U.S. at 184, quoting *United States v. Classic*, 313 U.S. 299, 326 [61 S.Ct. 1031, 85 L.Ed. 1368] (1941).

However, the question of absolute judicial immunity requires a somewhat different analysis. If one posits that, as WACO argues, MIRELES did not have absolute judicial immunity, his immunity was abrogated because he acted in the clear absence of jurisdiction, entirely without authority. Thus, by definition, the judge was not possessed of any power "by virtue of state law" when he made his order, was not "clothed with the authority" of the state, and did not act "under color of" any law. This situation is entirely distinct from that of police officers addressed in this Court's prior "under color of law" cases. Absolute judicial immunity, unlike the immunity accorded police officers, is unrelated to state of mind or good faith and is singularly dependent upon jurisdiction even where the judge acts with malice. *Stump*, *supra*, 435 U.S. at 356; see *O'Neil v. City of Lake Oswego*, 642 F.2d 367, 370 (CA9 1981).

Judicial immunity applies "however erroneous the act may have been, and however injurious in its consequences it may have proved to the plaintiff." *Cleavinger v. Sanner*, 474 U.S. 193, 199 [106 S.Ct. 496, 88 L.Ed.2d 507] (1985) (quoting *Bradley*, *supra*, 13 Wall. at 347); see *Ashelman v. Pope*, 793 F.2d 1072, 1075 (CA9 1986). By contrast police officers only have immunity where they can demonstrate they acted in good faith. *Pierson v. Ray*, 386 U.S. 547 [87 S.Ct. 1213, 18 L.Ed.2d 288] (1967). As to judicial officers, contrary to police officers, absolute immunity creates two mutually exclusive categories. There can be no intermediate or gray area in which a judge may avail himself of a demonstration of good faith. Either a judge acts pursuant to his authority and is absolutely immune from suit under 1983, regardless of his state of mind, or he acts outside his authority and is not acting under color of law as required to state a claim pursuant to 1983. These categories of judicial conduct are mutually exclusive. In either case, WACO cannot state a claim against Judge MIRELES[1]

---

[1]That this question of federal law presented by the Ninth Circuit opinion requires analysis and resolution by this Court is exemplified by the circumstance that each circuit opinion which involves a potential section 1983 claim against a judge necessarily decides this issue. Yet, no decision of this Court provides guidance to the circuits. Consequently, when the Seventh Circuit addressed the issue in *Lopez v. Vanderwater*, 620 F.2d 1229, 1236-37 (CA7 1980) and held a judge who acted entirely without jurisdiction was still acting under color of law for purposes of 1983, it stated it failed to recognize any reason to differentiate between judges and police officers in applying the color of law requirement. *Id.* at 1237. This conclusion without explanation totally ignores the differences between absolute judicial immunity and the limited good faith immunity accorded police officers.

III.

WACO CONTINUES TO MISREAD THE AUTHORITY WHICH GOVERNS THIS CASE.

While citing the barest of facts from the relevant cases the opposition brief analyzes none of them and, in fact, fails to address the determinative rulings of the two leading cases on absolute judicial immunity, ***Bradley v. Fisher***, 13 Wall. 335 [20 L.Ed. 646] (1872) and *Stump v. Sparkman*, *supra*, 435 U.S. 349. In both cases this Court unambiguously held the relevant inquiry in determining absolute judicial immunity is whether the judge acted in the clear absence of all jurisdiction regardless of his state of mind. However, the opposition brief completely ignores this threshold question characterizing *Stump* as a "general" rule not particularly applicable to this case. (Opp. Brf. pp. 5-6). Instead, WACO relies on the wholly distinguishable case of *Gregory v. Thompson*, *supra*, 500 F.2d 59 without responding to the reasoned discussion of its inapplicability to the instant case set forth in the petition and reflected in this Court's citation of it in *Stump*.

WACO's citation to *Zarcone v. Perry*, 572 F.2d 52 (CA2 1978) is also inapt. In *Zarcone*, unlike this case, the judge acted without jurisdiction because there was no actual case pending before him regarding the vendor he demanded be brought before him to be chastised for the quality of his coffee. The judge in *Zarcone* did not attempt to invoke the doctrine of judicial immunity. *Id.* at 53.

Similarly, WACO's claim the merits of the petition are in some manner disposed of since it does not cite to a case in which absolute judicial immunity has been accorded to a judge who has allegedly ordered the use of force is inefficacious. Assuming such an inquiry were relevant to the issues before this Court, such authority does exist in the Fourth Circuit. *Mullins v. Oakley*, *supra*, 437 F.2d 1217. The *Mullins* case thereby directly pits the Fourth Circuit

against the Ninth in light of its opinion in this case. In *Mullins* the complaint alleged a judge had ordered his bailiff to "forcibly" bring the plaintiff, an attorney who was in another courtroom, into the defendant judge's court. The judge then allegedly used "vile and slanderous" language against the attorney. *Id.* at 1217-18. The district court dismissed the complaint against the judge and the court of appeals affirmed. It held the judge was immune from suit under 42 U.S.C. § 1983 for both the alleged force and foul language. The court explicitly stated the centuries-old rule that "a judge may not be attacked for exercising his judicial authority, even if done improperly." *Id.* at 1218. That is the rule this Court relied on in *Stump*; it is the rule which applies here, and it is the rule disregarded by the Ninth Circuit opinion.

IV.

CONCLUSION

During the twelve years since this Court has addressed the doctrine of absolute judicial immunity in the context of 42 U.S.C. § 1983 in *Stump v. Sparkman*, *supra*, 435 U.S. 349, it has had occasion to analyze and refine the concept of judicial immunity in other contexts. Those cases instruct that the threshold consideration to determine whether a judge's acts are judicial and the proper subject of absolute immunity requires a functional approach. *Forrester v. White*, 484 U.S. 219 [108 S.Ct. 538, 98 L.Ed.2d 555] (1988). Yet, this Court's case law is silent as to this evolution of the judicial immunity analysis in cases subject to absolute judicial immunity. The law of judicial immunity as a whole may only be uniform, consistent and effectively applied by the circuit courts with direction as to the approach those courts are to employ.

Moreover, as the arguments of this reply and the original petition demonstrate, the Ninth Circuit's opinion misapplies the judicial immunity analysis prescribed by this Court. Consequently, the Ninth Circuit opinion directly conflicts with the rule of both *Stump* and *Bradley v. Fisher*, 13 Wall.

335 [20 L.Ed. 646] (1872). That misapplication also creates a conflict among the circuits on the issue of whether a judge who is alleged to have ordered an attorney into his court on a matter pending before him is immune from suit if the complaint asserts the order directed the use of force despite the heightened pleading standard of judicial immunity cases.

Furthermore, if it is determined a judge's conduct is judicial in character and subsequent analysis reveals that judicial function was exercised in the complete absence of all jurisdiction, the question becomes whether such conduct is under color of state law to justify an action under 42 U.S.C. § 1983. However, neither this court nor any circuit court has considered the issue of color of state law in cases which involve absolute judicial immunity.

Respectfully submitted,

TONI RAE BRUNO
Attorney of Record for Petitioner
RAYMOND MIRELES
CHASE, ROTCHFORD, DRUKKER & BOGUST
700 SOUTH FLOWER STREET
FIFTH FLOOR
LOS ANGELES, CALIFORNIA 90017
TELEPHONE: (213) 626-8711

JOHN A. DALY
DAVID LINK
CHASE, ROTCHFORD, DRUKKER & BOGUST
Attorneys for Petitioner
RAYMOND MIRELES

PROOF OF SERVICE BY MAIL

State of California

ss.

County of Los Angeles

I, the undersigned say: I am and was at all times herein mentioned, a citizen of the United States and a resident of the County of Los Angeles, over the age of eighteen (18) years and not a party to the within action or proceeding; that my business address is 11852 Santa Monica Boulevard, Suite 3, Los Angeles, California 90025; that on September 27, 1991, I served the within *Reply To Brief In Opposition To Petition For Writ Of Certiorari* in said action or proceeding by depositing true copies thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Los Angeles, California, addressed as follows:

Clerk, United States
Supreme Court
One First Street, N.E.
Washington, D.C. 20543
(By Express Mail: original and forty copies)

Clerk, U.S. Court of Appeals
Ninth Judicial Circuit
50 United Nations Plaza
Room 59
San Francisco, CA 94102
(415) 556-8011

Clerk, United States District Court for the
Honorable Terry J. Hatter
Central District
United States Courthouse
312 North Spring Street
Los Angeles, California 90012
(213) 894-5276

HUGH R. MANES
MANES & WATSON
(Counsel for Howard Waco)
3600 Wilshire Boulevard
Suite 1710
Los Angeles, California 90010
(213) 381-7793

JAMES K. HAHN,
City Attorney
BLANCA Z. HADAR,
Deputy City Attorney
(Counsel for Officers Gregory Baltad and Nicholas Titiriga)
1800 City Hall East
200 North Main Street
Los Angeles, California 90012
(213) 485-5408

I declare under penalty of perjury that the foregoing is true and correct. Executed on September 27, 1991, at Los Angeles, California.

Betty J. Malloy
(Original signed)

(3)

No. 91-311

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1991

RAYMOND MIRELES,

Petitioner

v.

HOWARD WACO,

Respondent.

BRIEF AMICUS CURIAE
OF
SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR
THE COUNTY OF LOS ANGELES
IN SUPPORT OF
PETITION FOR WRIT OF CERTIORARI

DE WITT W. CLINTON
County Counsel
FREDERICK R. BENNETT
Assistant County Counsel
Room 648
500 West Temple Street
Los Angeles, CA 90012
(213) 974-1903

Attorneys for
Superior Court

TABLE OF CONTENTS

TABLE OF AUTHORITIES

No. 91-311

In the Supreme Court of the

United States

October Term, 1991

Raymond Mireles,

Petitioner

v.

Howard Waco,

Respondent.

Brief Amicus Curiae
of
Superior Court of the State of California
for
the County of Los Angeles
in Support of
Petition for Writ of Certiorari

INTEREST OF AMICUS CURIAE

The Superior Court of the State of California for the County of Los Angeles is a political subdivision of the State of California within the meaning of Supreme Court Rule 37.5.[1] Accordingly, written consent from the parties for the filing of this brief is not required.

The Superior Court of the County of Los Angeles is the largest superior court in the State of California,[2] and constitutes one of the largest court systems in the nation. It is currently authorized to have 238 judges.

---

[1] The judicial power of the State of California is vested in its "Supreme Court, courts of appeal, superior courts, municipal courts, and justice courts." California Constitution, Article VI, §1.

[2] In each county within the State of California there is one superior court, with one or more judges. California Constitution, Article VI, §4. The State of California has 58 counties.

California Government Code §69586.

The Superior Court is a court of general jurisdiction.

The Superior Court and its judges support the granting of the Petition for Writ of Certiorari in this case which is in conflict with the common law principle of absolute judicial immunity for judicial acts performed by a judge of a court of general jurisdiction as consistently defined by the Supreme Court. The issue is important since the principle of judicial immunity exists not for the protection or benefit of judges, but for the benefit of the public whose interest it is that judges should be at liberty to exercise their functions with independence and without fear of consequences.

REASONS FOR GRANTING THE WRIT

1. **THE DECISION OF THE COURT OF APPEALS IS IN CONFLICT WITH THE COMMON LAW PRINCIPLE OF ABSOLUTE JUDICIAL IMMUNITY AS CONSISTENTLY DEFINED BY THE SUPREME COURT. IT PRESENTS AN IMPORTANT ISSUE, SINCE THE PRINCIPLE OF JUDICIAL IMMUNITY EXISTS NOT FOR THE BENEFIT OF JUDGES, BUT FOR THE BENEFIT OF THE PUBLIC WHOSE INTEREST IT IS THAT JUDGES SHOULD BE AT LIBERTY TO EXERCISE THEIR FUNCTIONS WITH INDEPENDENCE AND WITHOUT FEAR OF CONSEQUENCES. UNLESS REVERSED, JUDGES OF ALL COURTS WILL ACT AT THE RISK OF CIVIL LIABILITY EVERY TIME THEY ISSUE A BODY ATTACHMENT, ARREST WARRANT OR OTHER CUSTCDIAL DIRECTION FROM THE BENCH IN A CASE PENDING BEFORE THEM.**

In this case, a judge of a court of general jurisdiction is alleged to have ordered police officers to bring an attorney of record in a case pending on the court's calendar before that court from another location in the courthouse. It is alleged that he ordered the police

officers to do so with unreasonable force.

The attorney in question was counsel of record for a party to a proceeding on the court's calendar who had chosen to appear elsewhere because the attorney had determined that his case would not go forward that morning. (Complaint, Appendices to Petition, p. B-3, para. 7(a). The attorney alleges that the defendant judge was angered by the attorney's absence from the courtroom and ordered him brought "forcibly and with excessive force" to the courtroom for the morning calendar.

There is no question that the judge had the jurisdiction to require the attorney to be present in his courtroom and to order the attorney to be brought involuntarily to the court for the scheduled appearance. (California Code

of Civil Procedure §128, set out at p. 3 of the Petition). There is no question that the judge would be entitled to judicial immunity if it was alleged that he merely directed the officers to bring the attorney to his courtroom without directing them to use excessive force. (See opinion of the Court of Appeals, Appendices to Petition, p. A-5).

The Court of Appeals concluded, however, that the attorney could plead past judicial immunity and require the judge to answer the complaint and proceed to trial by alleging that the judge exercised his judicial power unreasonably by directing the officers to use excessive force in carrying out his lawful order to bring the attorney to his courtroom.

This qualification of the principle of judicial immunity threatens the

independence of judges because allegations of the unreasonableness of judicial acts can always be made. If the reasonableness of a clearly judicial act must be litigated before the immunity may be applied, judges in exercising the authority vested in them will not be free to act without apprehension of personal consequences.

This decision of the Court of Appeals is in direct conflict with the common law rule of judicial immunity as set forth in this Court's opinions in *Stump v. Sparkman* (1978) 435 U.S. 349, and *Bradley v. Fisher* (1872) 80 U.S. 335.

In *Stump v. Sparkman* this Court explained that the necessary inquiry in determining whether a judge of a court of general jurisdiction is immune from suit is whether at the time he took the

challenged action he had jurisdiction over the subject matter before him. Saying that the scope of the judge's jurisdiction must be construed broadly where the issue is immunity from suit, this Court explained that the judge will not be deprived of immunity because the action he took was in error, was done maliciously, or was in excess of his authority, but will be subject to liability only when he has acted in the clear absence of all jurisdiction.

In *Bradley v. Fisher* this Court said that the exemption of judges from civil liability cannot be affected by the motives with which their judicial acts are performed, noting that allegations of malicious or corrupt motives could always be made, and if motives could be inquired into, judges would be subjected to

vexatious litigation, whether the motives had or had not any real existence.

The Petition presents an important issue, since the principle of judicial immunity exists not for the benefit of judges, but for the benefit of the public whose interest it is that judges should be at liberty to exercise their functions with independence and without fear of consequences. See *Pierson v. Ray* (1967) 386 U.S. 547.

If a case seeking damages for judicial acts that are alleged to have caused damage cannot be quickly dismissed on the basis of an unequivocal principle of judicial immunity, the purpose of the rule will be defeated. The judge whose actions are being challenged and other judges aware of the litigation will be apprehensive that they are not protected by absolute judicial immunity, and in

varying degrees their decisions and judicial actions will be affected.

The consequences of permitting a litigant to plead past a motion to dismiss are significant even if the allegations are determined to be ultimately unfounded. The judge must arrange for counsel, although he may seek recovery of the cost thereof.[3] He may, as was the case here, be subjected to considerable criticism in the press or by the public when the case is not promptly dismissed. He may be required to respond to discovery concerning his judicial

---

[3] In California, the judge may be entitled to representation by the County Counsel upon request to the extent that such representation is not in conflict with and does not interfere with the County Counsel's other duties. California Government Code §27647. A judge who must retain his own counsel may recover the reasonable costs incurred from the County. California Government Code §27648.

actions and thought process. The lengthy pendency of the action may adversely affect his credit rating. Quite simply, the judge will be presented for a considerable period of time with events that may inhibit that judge and others in exercising the judicial authority vested in them free from apprehension of personal consequence. The purpose of the principle of judicial immunity and the public benefit it was established to further will not be served.

CONCLUSION

This Court should issue a writ of certiorari to the Ninth Circuit Court of Appeals to review its judgment and opinion in this action.

DATE: September 16, 1991

DE WITT W. CLINTON
County Counsel

FREDERICK R. BENNETT
Assistant County Counsel

SUPREME COURT OF THE UNITED STATES

RAYMOND MIRELES *v.* HOWARD WACO

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 91–311. Decided October 21, 1991

PER CURIAM.

A long line of this Court's precedents acknowledges that, generally, a judge is immune from a suit for money damages. See, *e. g.*, *Forrester* v. *White*, 484 U. S. 219 (1988); *Cleavinger* v. *Saxner*, 474 U. S. 193 (1985); *Dennis* v. *Sparks*, 449 U. S. 24 (1980); *Supreme Court of Virginia* v. *Consumers Union of United States, Inc.*, 446 U. S. 719 (1980); *Butz* v. *Economou*, 438 U. S. 478 (1978); *Stump* v. *Sparkman*, 435 U. S. 349 (1978); *Pierson* v. *Ray*, 386 U. S. 547 (1967).[1] Although unfairness and injustice to a litigant may result on occasion, "it is a general principle of the highest importance to the proper administration of justice that a judicial officer, in exercising the authority vested in him, shall be free to act upon his own convictions, without apprehension of personal consequences to himself." *Bradley* v. *Fisher*, 13 Wall. 335, 347 (1872).

In this case, respondent Howard Waco, a Los Angeles County public defender, filed suit in the United States District Court for the Central District of California under 42 U. S. C. §1983 against petitioner, Raymond Mireles, a judge of the California Superior Court, and two police officers, for damages arising from an incident in November

---

[1]The Court, however, has recognized that a judge is not absolutely immune from criminal liability, *Ex Parte Virginia*, 100 U. S. 339, 348–349 (1880), or from a suit for prospective injunctive relief, *Pulliam* v. *Allen*, 466 U. S. 522, 536–543 (1983), or from a suit for attorney's fees authorized by statute, *id.*, at 543–544.

1989 at the Superior Court building in Van Nuys, Cal. Waco alleged that after he failed to appear for the initial call of Judge Mireles' morning calendar, the judge, "angered by the absence of attorneys from his courtroom," ordered the police officer defendants "to forcibly and with excessive force seize and bring plaintiff into his courtroom." App. to Pet. for Cert. B-3, ¶7(a). The officers allegedly "by means of unreasonable force and violence seize[d] plaintiff and remove[d] him backwards" from another courtroom where he was waiting to appear, cursed him, and called him "vulgar and offensive names," then "without necessity slammed" him through the doors and swinging gates into Judge Mireles' courtroom. *Id.*, at B-4, ¶7(c). Judge Mireles, it was alleged, "knowingly and deliberately approved and ratified each of the aforesaid acts" of the police officers. *Ibid.* Waco demanded general and punitive damages. *Id.*, at B-5 and B-6.

Judge Mireles moved to dismiss the complaint as to him, pursuant to Civil Rules 12(b)(1) and (6), for failure to state a claim upon which relief could be granted. The District Court dismissed the claim against the judge and entered final judgment as to him, pursuant to Civil Rule 54(b), on grounds of "complete judicial immunity." App. to Pet. for Cert. D-2. On Waco's appeal, the United States Court of Appeals for the Ninth Circuit reversed that judgment. *Waco* v. *Baltad*, 934 F. 2d 214 (1991). The court determined that Judge Mireles was not immune from suit because his alleged actions were not taken in his judicial capacity. It opined that Judge Mireles would have been acting in his judicial capacity if he had "merely directed the officers to bring Waco to his courtroom without directing them to use excessive force." *Id.*, at 216. But "[i]f Judge Mireles requested and authorized the use of excessive force, then he would not be acting in his judicial capacity." *Ibid.*

Taking the allegations of the complaint as true, as we do upon a motion to dismiss, we grant the petition for certiorari and summarily reverse.

Like other forms of official immunity, judicial immunity is an immunity from suit, not just from ultimate assessment of damages. *Mitchell* v. *Forsyth*, 472 U. S. 511, 526 (1985). Accordingly, judicial immunity is not overcome by allegations of bad faith or malice, the existence of which ordinarily cannot be resolved without engaging in discovery and eventual trial. *Pierson* v. *Ray*, 386 U. S., at 554 ("[I]mmunity applies even when the judge is accused of acting maliciously and corruptly"). See also *Harlow* v. *Fitzgerald*, 457 U. S. 800, 815–819 (1982) (allegations of malice are insufficient to overcome qualified immunity).

Rather, our cases make clear that the immunity is overcome in only two sets of circumstances. First, a judge is not immune from liability for nonjudicial actions, *i.e.*, actions not taken in the judge's judicial capacity. *Forrester* v. *White*, 484 U. S., at 227–229; *Stump* v. *Sparkman*, 435 U. S., at 360. Second, a judge is not immune for actions, though judicial in nature, taken in the complete absence of all jurisdiction. *Id.*, at 356–357; *Bradley* v. *Fisher*, 13 Wall., at 351.

We conclude that the Court of Appeals erred in ruling that Judge Mireles' alleged actions were not taken in his judicial capacity. This Court in *Stump* made clear that "whether an act by a judge is a 'judicial' one relate[s] to the nature of the act itself, *i.e.*, whether it is a function normally performed by a judge, and to the expectations of the parties, *i.e.*, whether they dealt with the judge in his judicial capacity." 435 U. S., at 362. See also *Forrester* v. *White*, 484 U. S., at 227–229. A judge's direction to court officers to bring a person who is in the courthouse before him is a function normally performed by a judge. See generally Cal. Civ. Proc. Code Ann. §§128, 177, 187 (West 1982 and Supp. 1991) (setting forth broad powers of state judges in the conduct of proceedings).[2] Waco, who was

---

[2]California Civ. Proc. Code Ann. §128 (West Supp. 1991) provides in pertinent part: "Every court shall have the power to do all of the following: . . . (5) To control in furtherance of justice, the conduct of its ministerial officers, and of all other persons in any manner connected with a judicial proceeding before it, in every matter pertaining thereto." See *Ligda* v. *Superior Court of Solano County*, 5 Cal. App. 3d 811, 826, 85 Cal. Rptr. 744, 753 (1970) (public defender is "ministerial officer" and one of "all other persons in any manner connected with a judicial

(continued...)

called into the courtroom for purposes of a pending case, was dealing with Judge Mireles in the judge's judicial capacity.

Of course, a judge's direction to police officers to carry out a judicial order with excessive force is not a "function normally performed by a judge." *Stump* v. *Sparkman*, 435 U. S., at 362. But if only the particular act in question were to be scrutinized, then any mistake of a judge in excess of his authority would become a "nonjudicial" act, because an improper or erroneous act cannot be said to be normally performed by a judge. If judicial immunity means anything, it means that a judge "will not be deprived of immunity because the action he took was in error . . . or was in excess of his authority." *Id.*, at 356. See also *Forrester* v. *White*, 484 U. S., at 227 (a judicial act "does not become less judicial by virtue of an allegation of malice or corruption of motive"). Accordingly, as the language in *Stump* indicates, the relevant inquiry is the "nature" and "function" of the act, not the "act itself." *Id.*, at 362. In other words, we look to the particular act's relation to a general function normally performed by a judge, in this case the function of directing police officers to bring counsel in a pending case before the court.

Nor does the fact that Judge Mireles' order was carried out by police officers somehow transform his action from "judicial" to "executive" in character. As *Forrester* instructs, it is "the nature of the function performed, not the identity of the actor who performed it, that inform[s] our immunity analysis." 484 U. S., at 229. A judge's direction to an executive officer to bring counsel before the court is no more executive in character than a judge's issuance of a warrant for an executive officer to search a home. See *Burns* v. *Reed*, 500 U. S. ___, ___ (1991) ("[T]he issuance of a search warrant is unquestionably a judicial act") (slip op. 11).

Because the Court of Appeals concluded that Judge

---

[2](...continued)
proceeding" within the meaning of §128, and may be ordered to appear to assist criminal defendant).

Mireles did not act in his judicial capacity, the court did not reach the second part of the immunity inquiry: whether Judge Mireles' actions were taken in the complete absence of all jurisdiction. We have little trouble concluding that they were not. If Judge Mireles authorized and ratified the police officers' use of excessive force, he acted in excess of his authority. But such an action—taken in the very aid of the judge's jurisdiction over a matter before him—cannot be said to have been taken in the absence of jurisdiction.

The petition for certiorari is granted, and the judgment of the Court of Appeals is reversed.

It is so ordered.

SUPREME COURT OF THE UNITED STATES

RAYMOND MIRELES *v.* HOWARD WACO

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 91–311. Decided October 21, 1991

JUSTICE STEVENS, dissenting.

Judicial immunity attaches only to actions undertaken in a judicial capacity. *Forrester* v. *White*, 484 U. S. 219, 227–229 (1988). In determining whether an action is "judicial," we consider the nature of the act and whether it is a "function normally performed by a judge." *Stump* v. *Sparkman*, 435 U. S. 349, 362 (1978).[1]

Respondent Howard Waco alleges that petitioner Judge Raymond Mireles ordered police officers "to forcibly and with excessive force seize and bring" respondent into petitioner's courtroom. App. to Pet. for Cert. B-3, ¶ 7(a). As the Court acknowledges, ordering police officers to use excessive force is "not a 'function normally performed by a judge.' " *Ante*, at 4 (quoting *Stump* v. *Sparkman*, 435 U. S., at 362). The Court nevertheless finds that judicial immunity is applicable because of the action's "relation to a general

---

[1]See also *Supreme Court of Virginia* v. *Consumers Union of United States, Inc.*, 446 U.S. 719, 736–737 (1980) (judge not entitled to judicial immunity when acting in enforcement capacity); cf. *Mitchell* v. *Forsyth*, 472 U.S. 511, 520–524 (1985) (Attorney General not absolutely immune when performing "national security," rather than prosecutorial, function). Moreover, even if the act is "judicial," judicial immunity does not attach if the judge is acting in the " 'clear absence of all jurisdiction.' " *Stump* v. *Sparkman*, 435 U.S., at 357 (quoting *Bradley* v. *Fisher*, 13 Wall. 335, 351 (1872)).

function normally performed by a judge." *Ante*, at 5.

Accepting the allegations of the complaint as true, as we must in reviewing a motion to dismiss, petitioner issued two commands to the police officers. He ordered them to bring respondent into his courtroom, and he ordered them to commit a battery. The first order was an action taken in a judicial capacity; the second clearly was not. Ordering a battery has no relation to a function normally performed by a judge. If an interval of a minute or two had separated the two orders, it would be undeniable that no immunity would attach to the latter order. The fact that both are alleged to have occurred as part of the same communication does not enlarge the judge's immunity.

Accordingly, I respectfully dissent.

SUPREME COURT OF THE UNITED STATES

RAYMOND MIRELES *v.* HOWARD WACO

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 91–311. Decided October 21, 1991

JUSTICE SCALIA, with whom JUSTICE KENNEDY joins, dissenting.

"A summary reversal . . . is a rare and exceptional disposition, 'usually reserved by this Court for situations in which the law is well settled and stable, the facts are not in dispute, and the decision below is clearly in error.'" Stern, Gressman & Shapiro, Supreme Court Practice 281 (6th ed. 1986) (quoting *Schweiker* v. *Hansen*, 450 U. S. 785, 791 (1981) (Marshall, J., dissenting)). As JUSTICE STEVENS' dissent amply demonstrates, the decision here reversed is, at a minimum, not *clearly* in error.

I frankly am unsure whether the Court's disposition or JUSTICE STEVENS' favored disposition is correct; but I am sure that, if we are to decide this case, we should not do so without briefing and argument. In my view, we should not decide it at all; the factual situation it presents is so extraordinary that it does not warrant the expenditure of our time. I would have denied the petition for writ of certiorari.

No. 91-311-CFX
Status: DECIDED

Title: Raymond Mireles, Petitioner
v.
Howard Waco

Docketed:
August 20, 1991

Court: United States Court of Appeals
for the Ninth Circuit

Counsel for petitioner: Bruno,Toni Rae

Counsel for respondent: Manes,Hugh R.

Entry	Date	Note	Proceedings and Orders
1	Aug 20 1991	G	Petition for writ of certiorari filed.
2	Sep 6 1991		Brief of respondent Howard Waco in opposition filed.
3	Sep 11 1991		DISTRIBUTED. September 30, 1991
4	Sep 11 1991	X	Brief amicus curiae of County of Los Angeles filed.
6	Sep 27 1991	X	Reply brief of petitioner Raymond Mireles filed.
7	Oct 7 1991		REDISTRIBUTED. October 11, 1991
9	Oct 15 1991		REDISTRIBUTED. October 18, 1991
10	Oct 21 1991		Petition GRANTED. Judgment REVERSED. Dissenting opinion by Justice Stevens. Dissenting opinion by Justice Scalia. Opinion per curiam.

****